# CONTENTS OF BRIEF.


| | | PAGE. |
|---|---|---|
| I. | Statement of Case | 1 |
| II. | Jurisdiction | 8 |
| III. | BRIEF OF ARGUMENT. | |
| | A. Annexation of Hawaii ; Power of Congress | 6 |
| | B. Effect of Congressional Annexation | 7 |
| | C. Insular Cases support proposition that Congress extended full operation of Constitution to Hawaii | 7 |
| | D. All provisions enforceable anywhere in the U. S., enforceable in Hawaii. | 8 |
| | E. Argument *ab inconvenienti* has no application here | 8 |
| | ARGUMENT. | |
| IV. | How Hawaii became part of the U. S. | 9 |
| V. | The reluctance of Hawaii to accept the situation created by its own act | 14 |
| VI. | The Power of Congress | 16 |
| VII. | What Congress intended | 19 |
| VIII. | The Insular Decisions and their Bearing on the Case at Bar | 23 |
| IX. | Mr. Justice Brown's Opinion | 27 |
| X. | The theory of the Concurring Opinion | 37 |
| XI. | Conditions in Hawaii make evident the intention of Congress | 50 |
| XII. | The Natural Law Doctrine | 58 |

## Alphabetical Index of Authorities.


Am. Pub. Co. *v.* Fisher, 166 U. S. 467 ..... 32
Broom's Legal Maxims, 7th Am. Ed., p. 625 ..... 52–53
Burgess, Political Science and Const. Law, Vol. I. .... 32
Butler, Treaty Making Power ..... 16
" " " " 72 ..... 20
Clawson *v.* U. S., 114 U. S. 486 ..... 56
Downes *v.* Bidwell, 182 U. S. 287 *et seq* ..... 17
" " " " 283 ..... 24
" " " " 345, 346 ..... 25
" " " " 244 note ..... 26
" " " " 271 ..... 27
" " " " 276–277 ..... 28
" " " " 282–283 ..... 29
" " " " 269–270 ..... 30
" " " " 279 ..... 33
" " " " 286 ..... 34
" " " " 269-270 ..... 36
" " " " 289, 293 ..... 37
" " " " 293 ..... 37
" " " " 294–295 ..... 38
" " " " 319 ..... 39
" " " " 334 ..... 41
" " " " 336 ..... 41
" " " " 336 ..... 41
" " " " 290 ..... 42
" " " " 331–333 ..... 43–44
" " " " 294 ..... 62
Edwards, *ex parte* 13 Hawaii, 47 ..... 55-56-57
Hawaiian Civil Laws, § 1109 ..... 50
" Constitution, Art. 1, §3 ..... 50
" Organic Act, §101 ..... 45
" " " §§5, 6 ..... 49
Hess *v.* White, 9 Utah, 67 ..... 32-33
Republic of Hawaii *v.* Edwards, 11 Haw. 571 ..... 51
Ritchie on Natural Law ..... 61
Ross, in re., 140 U. S., 453 ..... 35
Shively *v.* Bowlby, 152 U. S. 1., p. 48 ..... 17
Springville *v.* Thomas, 166 U S., 707 ..... 29
" " " " " 708 ..... 31
U. S. *v.* Hill, 1 Brock, 156, 159 ..... 54
U. S. Rev. St., §1851 ..... 32, 41, 43

# Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 219.

THE TERRITORY OF HAWAII,
Appellant,

AGAINST

OSAKI MANKICHI,
Appellee.

**Appeal from the District Court of the United States for the District of Hawaii.**

**Brief for the prisoner, the Petitioner-Appellee.**

## I.

## Statement of the Case.

This is an appeal by the Territory of Hawaii from an order made by the District Court of the United States for that Territory (Estee, J.) discharging Osaki Mankichi, the petitioner, from further imprisonment under a conviction for manslaughter by the Circuit Court of Hawaii on the ground that his trial had been in violation of the Constitution of the United States.

The petitioner was admitted to bail pending this appeal by the Territory, but being without sufficient means

to furnish bail ($5,000) he is and has since May, 1899, been in jail.

The facts may be briefly stated.

On the 4th day of May, 1899, a presentment was filed against Osaki Mankichi, the appellee, by the Hon. A. Perry, then Circuit Court Judge of the Territory of Hawaii, charging him with the crime of murder. On this presentment, during the same (May) term, he was tried and found guilty of manslaughter in the first degree by nine jurors, three dissenting (Rec., p. 7). The law in force in Hawaii when the island was annexed provided for a trial on information without a Grand Jury and for conviction upon a vote of nine of the petit jury.

The indictment was found "in the name of the Republic of Hawaii" (Rec., p. 3), which had then ceased to exist in substance and in name. The record of the trial is also in the name of "The Republic of Hawaii" (p. 7), whose posthumous dignity alone can have been assailed by Mankichi. The Republic itself had no entity, except perhaps as a pious souvenir, a cherished sentiment for those days when the citizens of Hawaii were free from the trammels of the Constitution of the United States.

The mittimus (p. 3) is addressed to "Arthur M. Brown, Esq., Marshal of the Republic of Hawaii" (p. 3), although it was issued in May, 1899, *i. e.*, nine months after the surrender of Hawaii's sovereignty to the United States.

The appellee was nominally discharged from confinement by Judge Estee, District Judge of the United States in and for the Territory of Hawaii, September 12, 1901 (Record, p. 17), but is still in custody, the appeal to this Court and his inability to furnish bail having prevented his actual release. The learned District Judge, in a terse and lucid opinion, held that since the passage of the Act of Congress annexing the islands and the transfer of sovereignty to the United States, the portions of the Constitution prescribing indictment and jury trials in criminal cases applied to Hawaii, especially in view of the

provision of the Act continuing in force the municipal law of Hawaii not "contrary to the Constitution." The question is there clearly presented and we can do little more than elaborate the arguments there outlined.

The following dates are important to bear in mind:

1. The Act of Congress annexing Hawaii (the Newlands Joint Resolution), was approved July 7, 1898.

2. Surrender of sovereignty and possession was effected August 12, 1898 (Solicitor-General's Brief on submission, p. 35).

3. Conviction of petitioner was had in May, 1899.

4. Act organizing the government of the Territory, June 14, 1900.

5. A proposed Treaty of Annexation, alleged by the counsel from Hawaii to be of September 11, 1897. (Dole's Brief, p. 11, on submission.)

## II.

## Jurisdiction.

The question of jurisdiction is fully discussed in the opinion of the learned Judge below, and also in the brief heretofore filed (on submission) by our associates.

As was stated by the former,

> "this is a federal question raised in the territory
> "of the United States which is governed by Fed-
> "eral law under the Constitution and statutes of
> "the United States." Rec., p. 11.

The Appellee claims that he is held by the authorities of Hawaii in plain violation of Articles V and VI of the Amendments to the Constitution, which are as follows:

"ARTICLE V.

"No person shall be held to answer for a capital, "or otherwise infamous crime, unless on a present- "ment or indictment of a Grand Jury, except in "cases arising in the land or naval forces, or in the "Militia, when in actual service in time of War or "public danger; nor shall any person be subject for "the same offence to be twice put in jeopardy of "life or limb; nor shall be compelled in any Crim- "inal Case to be a witness against himself, nor be "deprived of life, liberty, or property, without due "process of law; nor shall private property be taken "for public use, without just compensation."

"ARTICLE VI.

"In all criminal prosecutions, the accused shall "enjoy the right to a speedy and public trial, by "an impartial jury of the State and district wherein "the crime shall have been committed, which dis- "trict shall have been previously ascertained by "law, and to be informed of the nature and cause "of the accusation; to be confronted with the wit- "nesses against him; to have compulsory process "for obtaining witnesses in his favor, and to have "assistance of counsel for his defence."

And also section two of Article III, which declares

" The trial of all crimes, except in Cases of Impeachment shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed."

Whatever question there may be as to the validity of this claim can only be determined by an inspection of the Record, which inspection will alone make it possible to decide whether or not the Constitution is violated in

the person of the Appellee. That decision will determine the merits of this controversy as well as the technical point raised—but not pressed—as to the jurisdiction.

If it should appear that the Constitution of the United States does not govern or apply to the Hawaiian territory, the Appellee is without remedy in this proceeding. If, on the contrary, this Court shall be of opinion that the ordinary meaning of the English language is to control in the construction of the Newlands Resolution, and that Congress was lawfully exercising its power when it fixed the conditions upon which Hawaii should be received as part of the territory of the United States, then, we submit, jurisdiction exists. In that event, both questions being resolved in the Appellee's favor, the decision rendered below should be affirmed.

The cases cited by Mr. Dole (argument, p. 5, on submission) do not apply. The Court there simply pronounced against "the review by habeas corpus of the judgments of *State Courts* in Criminal Cases." This distinction was in the mind of the learned District Court Judge (Judge Estee) and is made clear in his opinion.

## III.

### Brief of the Argument.

It may be conducive to the convenience of the Court to have in very brief outline a summary of our contentions.

The proposition upon which we rely and the soundness of which is determinative of this case is

**From the moment the annexation of the Hawaiian Islands became complete and they passed under the sovereignty and jurisdiction of the United States by virtue of the Act of Congress of July 7th, 1898, no citizen or inhabitant thereof could "be held for a capital or otherwise infamous crime unless on presentment of a grand jury," nor be convicted for such crime without a unanimous verdict of a petit jury.**

The reasoning in support of this proposition may be summarized as follows:

*A.*—Hawaii was annexed by act of Congress and not by treaty, hence much, if not all, of the judicial discussions in the opinions in the Insular Cases can have little or no relevancy to Hawaii.

That Congress has full power to acquire and annex foreign territories, and to provide for the government thereof is not disputed, nor can it be disputed that it is competent for Congress to extend to the inhabitants of the territories annexed the privileges and protection of the Constitution of the United States.

It was the intention of Congress to extend the protection and privileges of the Constitution, including Jury Trial, to Hawaii from the moment it came under the sovereignty of the United States.

This intention is manifest both from the language of the Act of Congress (Newlands Resolution) extending the Constitution to Hawaii, and also from the history of the islands which shows them to have been American in institutions and law since 1847, at which time the Government of the United States was prevented by mere accident from admitting Hawaii into the Union as a State.

*B.*—Congress having full power to annex did so, and the conditions of the annexation must be sought in the law annexing the islands. The question is thus one involving the construction of a municipal statute, and has no relation to questions arising between two sovereign States under a treaty, nor is it affected by any rules of the "law of nations."

The act of Congress not only annexed the Islands, but provided a code of municipal legislation by which the Islands should be governed "until the Congress of the United States should otherwise determine."

The act abrogated at once all treaties of the Hawaiian Islands with foreign nations, and all municipal legislation enacted for the fulfillment of such treaties, and all legislation which was *"contrary to the Constitution of the United States,"* or to any existing treaty of the United States; but with these exceptions all other municipal legislation of the Hawaiian Islands, the act declared "shall remain in force until Congress shall otherwise determine."

*C.*—The opinions of the majority of the Court in the Insular Cases fully support the proposition that the action of Congress in extending the full operation of the Constitution to that territory made it unlawful to conduct criminal trials save as prescribed by the III Article and by the Fifth and Sixth amendments to the Constitution of the United States. Conformity to these Constitutional requirements was readily attainable under then existing Hawaiian Law.

*D.*—The proposition (relied upon by the Solicitor-General) that the language of the Act does not affect the legal situation and leaves it just where it would have been had Congress been silent on the subject, is fallacious both in its premises and conclusion. The plain language of the Newlands Resolution was to put in operation in the Hawaiian Islands all the provisions of the Constitution enforceable anywhere in the United States.

*E.*—The argument *ab inconvenienti* can have no application here.

The Criminal Courts in Hawaii have had criminal law jurisdiction for more than half a century; they had power to empanel a grand jury and to instruct the petit jury of twelve before whom this case was tried that conviction could only be had by unanimous verdict.

Congress knew this and must have intended to make trials there conform to those conducted elsewhere under Federal authority. Such intention indicates an appreciation of the real situation and not a desire to empty the jails, as the eminent counsel from Hawaii seems to fear.

## THE ARGUMENT.

### IV.

### How Hawaii became part of the territory of the United States.

The annexation of Hawaii was brought about by an Act of the Congress of the United States in the form of a Joint Resolution approved July 7, 1898 (printed in full as an appendix to this brief). The preamble recites the consent of the Government of Hawaii to cede its sovereignty over the islands, and then follow the clauses of the Act directly pertinent to this case.

> "Resolved, by the Senate and House of Representatives, etc., That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof. * * * The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations.
>
> *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

It would seem unnecessary to spend much time, or any time at all, upon this question, were it not that a singular misapprehension pervades the argument of the learned Counsel from Hawaii and perhaps misleads him into wrong conclusions. It is therefore with a view

to clearing away some preliminary questions which, while they do not go to the root, may tend to obscure the question that we dwell somewhat upon the argument of the learned Counsel from Hawaii.

If he is correct in his statements made with impressive iteration, Hawaii being a sovereign state entered into a "Treaty of political union" with the United States "and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America," Hawaii yielded up its sovereignty and public property to the latter power. (See Dole's Argument on Submission, pp. 12 and 13).

As we can find no evidence of any Treaty, it might be enough to state that no such Treaty exists or then existed. Solemn agreements between independent nations are not lost or mislaid, certainly not by both parties to the contract. Some evidence should be adduced to substantiate the assertion that such an instrument had been duly executed by the parties respectively interested. But not only does the Counsel insist upon its existence, but he depends mainly, if not wholly, upon the effect of this unproved and invisible treaty to defeat the contention of the Respondent in his effort to regain his liberty.

> "The Hawaiian Islands," he says (at page 14 of the Brief on submission) "ceased to be an independent nation in 1898. They did not become an organized territory of the United States until 1900. There was a transition period, unless, for a period of about two years, they were deprived of the legitimate protection of civilized government. *They safeguarded against this calamity by Treaty,* made while they were a sovereign nation. It was one of the principal conditions of their surrender of sovereign rights. It was a *retention of powers expressly reserved.*"

There is nothing very remarkable about this sentence except the number of fallacies that have been crowded into so small a compass. There was *no* transition pe-

riod, Hawaii was *not* deprived of the legitimate protection of civilized government, there was *no* safeguard by Treaty for there was *no* Treaty, there was *no* principal, or any condition in the surrender of sovereign rights, there was *no* retention of powers expressly reserved.

This learned Court may perhaps be disposed to consider the above as purely verbal criticism, and while holding that there was no annexation by Treaty, the language of the counsel from Hawaii may be taken to mean only that the cession to and acceptance by the United States was equivalent to a Treaty of Annexation and that practically the result is the same as though he had not resorted to the fiction of a Treaty as that expression is usually and properly understood. This may be the just and reasonable way of dealing with extravagant forms of speech in which counsel are apt to indulge and for which all of us must at times look to the Court for kindly forbearance.

But it is evident that the learned counsel means more than this and that he derives apparent comfort from this non-existent and unseen compact. Wherein his case is improved by such an assumption, we are not able to see, but it does not follow that our incapacity in this respect will be shared by the Court. It seems to us that the case for the respondent would be quite as strong if a Treaty had been made in the manner and form provided by the Constitution and *followed by an Act of Congress*, such as the Newlands Resolution. However this may be, we prefer to deal with facts as they are, not overtrusting our ability to meet ingenious and earnest arguments based upon a fallacy. It is well, therefore, to bear in mind that all that was done was done by Congress itself and not by the Treaty-making power.

The learned Solicitor-General throws some light on the subject of the Treaty in his brief (on submission, p. 7), but not as much as might have been hoped for. He evidently does not attach the same importance to this mysterious instrument as his colleague from Hawaii.

> "By the Treaty of Annexation which was formally consented to by the Republic of Hawaii

> and submitted to this country, a cession was proposed upon certain terms and conditions which were stated. By the passage of the resolution of annexation the offer of cession was accepted and the islands annexed 'as a part of the territory of the United States' upon the terms stated in the Treaty and incorporated in the resolution, which is printed in the appendix."

The so-called "Treaty" to which the learned counsel refers was only "consented to" by the Republic of Hawaii and *"submitted"* to this country. It is plain that it never took the shape of a Treaty, that it was not accepted by the President and Senate in the usual and regular form and can be called a Treaty only on the theory that one party may execute such an agreement without a like execution by the other party. If so, our legal vocabulary must be revised and we must admit the idea of a "unilateral treaty," a novelty up to this date and a creature of the imagination of the learned counsel for the Territory of Hawaii. If we turn to the act of cession and its terms we find no mention of any such instrument. It may be, as the learned Solicitor-General states that "the terms stated in the Treaty 'were' incorporated in the resolution," but there is certainly no evidence of this, or that Congress had ever heard of the Treaty in the acceptance of the cession. For some reason or other, Congress acted precisely as though no such agreement or compact had ever been made.

When the learned counsel, the Attorney-General for Hawaii, lays great stress upon his Treaty he must be actuated by the belief that his position would be strengthened were there in fact such a situation as he described previous to the cession, or by the difficulty which he may experience in seeking to justify an absolute cession with the limited authority conferred by Article 32 of the Constitution of Republic of Hawaii. That section provides that

> "The President, with the approval of the Cabi-

net, is hereby expressly authorized and empowered to make a treaty of political or commercial union between the Republic of Hawaii and the United States of America, subject to the ratification of the Senate."

Possibly the learned counsel who played so important a part in the transfer of Hawaii to the United States may deem it necessary to maintain that the power to make such a Treaty involved the authority to erase the name of the Republic from the nations of the world. It may be that the cession of Hawaii's sovereignty, territory and property was embraced in the expression "a treaty of political union." He certainly so claimed to the last, for when he dug the grave of the little Republic and pronounced its funeral oration he deliberately informed his hearers that "a treaty of political union had been made," whereupon "the Hawaiian band played Hawaii Ponoi for the last time, *taps were sounded* and the Hawaiian flag came down and was taken possession of by the Hawaiian Corporal of the Guard."

If the so-called Treaty was effective for nothing else, it was quite conclusive as putting an end to the late Republic. Its act of self immolation was complete; from that moment it became a memory; it stands as a *magni* (or parvi) *nominis umbra* never again to be counted among the nations as a sovereign power. However interesting the traditions of the early Kamehamehas may be, not to speak of the fame of their more recent successors, they belong solely to history and can create no rights when "the new master has spoken."

## V.

## The Reluctance of Hawaii to accept the situation created by its own act.

It is possible that the citizens of the Republic of Hawaii did not quite realize the situation created by this Treaty of Political Alliance. Even so high an officer as Mr. Brown, "the high sheriff of the Territory of Hawaii," alleges in defence of the imprisonment of Mankichi that "the provisions of Articles V and VI of the Amendments to the Constitution of the United States relating to presentments and indictments by grand juries and to trial by petit juries were not in force and effect *within the Republic of Hawaii* or the Hawaiian Islands, nor applicable thereto at the time of the indictment, trial and conviction of said Osaki Mankichi." He avoids any mention of the "Territory of Hawaii," although the conviction was had "in the Circuit Court of the first circuit Territory of Hawaii." (Rec., p. 7.)

Attorney-General Dole insists that "there was a retention of powers expressly reserved" (p. 14 argument on submission) and proclaims that he stands on "treaty rights" (p. 38). "At the same time that the flag was raised on the Government house what is *said to be the same flag that was lowered* by order of Commissioner Blount from the Judiciary Building, was raised there." (Sewall to Day, Aug. 15, 1895; App. to Solicitor General's Brief on Submission, p. 44.)

On the same day that the cession was formally consummated "a proposition was *made and strongly endorsed*" to have the Hawaiian flag raised on one of the staffs as a territorial or local flag, but Minister Sewall refused his permission on the ground that his instructions did not make it possible. While the officers of the Republic took a solemn oath to support and defend the Constitution of the United States, they objected to the addition of an oath of office on the ground that they were not elected or appointed under the President of the United States.

In the absence of instructions, Minister Sewall did not insist upon the oath. Finally, the claim was made that Hawaii might establish a coast-wise trade and the flag of Hawaii flown, the same flag that had been taken down and superseded by the flag of the United States. There may be nothing remarkable in this attempt to ignore accomplished facts and to continue the dead past as though it were a living reality. Laymen, business men, dissatisfied citizens might be excused for such a mistake, but the case becomes more remarkable when we find that the Supreme Court of the Territory on the 5th day of June, 1899, held that Hawaii could register vessels although the Territory was annexed to and formed part of the United States. But the Attorney-General of the United States declined to take this view:

> "With due respect to the judgment of the Supreme Court of Hawaii, I am unable to admit that an Hawaiian register can now be issued to a vessel and the flag of Hawaii, the usual token of registration be flown by her." (Rec. Judge Estee's Op., p. 12.)

These facts are perhaps of themselves unimportant and may throw little light upon the question really involved; but their recital may be interesting and of some value, in view of the argument of Attorney-General Dole and as explaining the earnestness with which he seeks, with others, to minimize or neutralize the importance of Hawaii's absolute and unqualified surrender and unconditional annexation by Act of Congress.

## VI.

### The Power of Congress.

The power of Congress to deal with newly acquired territory has been held to be absolute and almost unlimited. (Insular Cases, 182 U. S.) What the source of that power is or may be it is unnecessary to inquire; so long as the conclusion is fixed that the power exists. The power of Congress is frequently referred to as a plenary power over the territories of the United States.

> "Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated under the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any direct and express application of its provisions." Mr. Justice Bradley in Mormon Church Case, 136 U. S., p. 44.

It will probably not be claimed that where in addition to these inferences and this reliance upon the general spirit of the Constitution we have express terms showing that Congress intended to apply the Constitution, and the whole of it, to the territories, the case is any weaker for that reason.

> "The doctrine laid down in Murphy *v.* Ramsey and the Mormon Church case," says Mr. Butler, in his recent and excellent work on the Treaty Making Power, "that the power of the United States to govern territory is plenary, has been constantly affirmed and followed by the United States Supreme Court. Chief Justice Waite and Justices Field and Matthews have delivered and concurred in opinions sustaining this plenary power."

Mr. Butler also quotes to the same effect the strong

language used by Mr. Justice Gray in Shively *v.* Bowlby, 152 U. S., 1, p. 48, in which he says:

> "By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories so long as they remain in a territorial condition."

A further citation of authorities, however creditable to the industry of counsel would add no further light to the subject. Indeed the principle laid down not only expresses the law upon the subject as it must strike enlightened jurists, however they may differ as to the applicability of particular limitations of the Constitution, but will also stand the test of common sense.

It is obvious that when by conquest or by amicable cession the territory of one people is transferred to the people of another there must be some power in the new sovereign to govern the incoming territory and that power can, from the very nature of things, be placed under no other authority than that of Congress.

It may even be granted that the treaty-making power is not competent to incorporate acquired territory into the United States so as to make it a part thereof unless Congress has in some form expressly or impliedly consented thereto. Opinion Justice White in Downes *v.* Bidwell, 182 U. S., 287 *et seq.*

We may even go so far as to hold that where a Treaty might contain a provision incorporating newly acquired territory, Congress might accept the cession and reject the condition. In other words, it may be, and this hypothesis has the sanction of eminent and learned Justices of this Court, that Congress is the final arbiter without whose decision foreign territory cannot become part of the United States in a domestic sense. But however interesting the discussion may be it cannot give us any aid in the present case, for none of the questions which have thus far taxed the learning and experience

of our judges will be found to embarrass us when we remember that Hawaii was acquired without the intervention of any other power, that its cession was voluntary and absolute, that its surrender of sovereignty was without reservation, and that the actor on the part of the United States was Congress.

The cession was therefore not the work of the President and Senate alone; it was the work of *both branches of the National Legislature,* and the sole question remains whether Congress intended by the language of the Joint Resolution forbidding the enforcement of municipal laws "contrary to the Constitution," to extend to those islands the benefits of the Fifth and Sixth Amendments of the Constitution of the United States.

There are but two instances in our history of a cession by a foreign country of all its territory, sovereignty and rights to the United States, namely, the cases of Texas and Hawaii.

The fact that the latter cession was so absolute and complete as to destroy and put an end to the nationality of the ceding nation, may explain why the Treaty proposed by Hawaii and denominated by Governor Dole a "Treaty of Political Alliance," was not accepted. The surrender could easily be made, as the result has shown, without the intervention of diplomacy. There certainly could be no object in incurring or pretending to incur international obligations to a nation that signed its death warrant when it executed the transfer of its sovereignty to the United States under an Act of Congress. Granting that the United States should fail to carry out its obligations, who is to enforce them when the only party concerned and interested was forever estopped from raising its voice? If Congress would have been at liberty to impose burdens upon Hawaii even after the execution of the supposed Treaty and in defiance thereof, how much stronger the case where Congress originally and alone dealt with the subject.

## VII.

### What Congress Intended.

It was the manifest intention of Congress in dealing with Hawaii to provide for so absolute and complete a transfer of dominion that no question should thereafter arise upon that subject. If Congress failed in this particular, the failure must be attributed to an imperfect vocabulary and not to a doubtful intention. The text of the Joint Resolution of July 7, 1898, recites that the Republic of Hawaii in due form signified

> "its consent in the manner provided by its con-
> "stitution to cede absolutely and without reserve
> "to the United States of America all rights of
> "sovereignty of whatsoever kind in and over the
> "Hawaiian Islands and their dependencies, and
> "also to cede and transfer to the United States the
> "absolute fee and ownership of all public, govern-
> "ment, or crown lands, public buildings or edifices,
> "ports, harbors, military equipments, and all other
> "public property of every kind and description be-
> "longing to the government of the Hawaiian
> "Islands, together with every right and appurte-
> "nance thereunto appertaining."

This cession was accepted and by the act itself the Hawaiian Islands and their dependencies were "annexed as a part of the territory of the United States subject to the sovereign dominion thereof." It is not necessary to argue that when all rights are ceded absolutely and without reservation, that there are any rights left in the grantor, or that he retains any interest in the buildings and property which he has transferred in the language above cited. Nor is it necessary probably to argue that when the Hawaiian Islands were annexed as a part of the territory of the United States they actually became a part of the territory of the United States and that when they consented to become subject to the dominion thereof, their own sovereignty was merged, lost

and disappeared. It might be an interesting exercise of ingenuity for a philologist to endeavor to make the intention clearer; he would probably fail.

Another and equally clear intention seems to have been the protection of the Hawaiian residents by insisting that no municipal legislation should be tolerated which contravened in any way the Constitution of the United States; not a part of the Constitution for none of it is excepted, but the whole of it as far as any of its provisions by the most generous interpretation may be made applicable.

It did not occur, we may safely assume, to the men in the Senate and in the House or to the President of the United States that the extension of this Constitution would be assailed as an injury or denounced as a breach of trust. There are some subjects in this country upon which the language of eulogy is frequently stretched until it cracks.

> "There is no grander subject for study, no nobler theme for literature, than the Constitution of the United States, not only from historical, but also from ethical and ethnical points of observation; it is no wonder, therefore, that it has been the subject of thought, study and expression of opinion by many of the ablest legal scholars in our own country, and also in those other countries, where the practical operation of the Constitution was watched, at first with doubt, and afterwards in wonder and with admiration." (Grandeur of the Constitution as a Subject for Study; Butler on Treaty-Making Power, p. 72.)

The Constitution has been described as a work so perfect and admirable as to bear on its face the evidence of almost divine inspiration. Its makers have been glorified as benefactors of the human race and we have been most of us brought up to consider that those countries in which the people did not have that Constitution as a shield were less favored than ourselves.

It never can have occurred to our law-makers that they were violating the trust of Attorney-General Dole and perhaps of others and the obligations of friendship, honor and justice by correcting whatever there might be in the Islands of Hawaii that required correction, through the introduction of an Act which made a Nation of these States. It is curious, too, that this idea never suggested itself to the learned counsel, who was a *magna pars* in the annexation, that his people could be otherwise than gainers if the Constitution were to take effect instantly upon the demise of the little Republic.

None of the officials appear to have hesitated to take the oath of allegiance in terms to the Constitution of the United States, and yet we are told to-day with much vehemence of oratory that if Congress meant what it said, a crime has been committed which will appall the world.

Leaving aside oratorical exaggeration, we understand the argument to be that while no reservation was made in the provision subjecting the municipal laws of Hawaii to the Constitution, yet Congress cannot have intended this, for the results would be too shocking to think of.

The learned counsel and Attorney-General for Hawaii has very correctly stated one of the rules with regard to the interpretation of agreements "In the interpretation of a contract," he says, "the intention of the parties is the pole star." But this astronomical anology, while quite sound, is subject to another rule of no less importance and no less firmly settled. The Court will look first to the language used, and if that language is plain and unambiguous, it will be controlled in the interpretation by the words which are presumed to represent the thoughts and intentions of the parties.

It is no less true in English than it is in Latin that where there is no ambiguity there is no room for interpretation.

Is there any ambiguity here?

Upon the execution of the cession, upon the seizure of the Islands by the United States, upon the hoisting of

the American flag, the legislation of Hawaii became subject to the will of the new sovereign. Congress might permit it to exist or might abolish it or might adopt a middle course and permit it to continue, provided it coincided with those rules and principles which have been considered necessary to the protection of a free people.

Congress chose not to tear up the municipal legislation of the Hawaiian Islands, but to permit it in a modified sense to continue in existence as a code of laws enforced by the new sovereign.

> "The municipal legislation of the Hawaiian Islands * * * not inconsistent with this general resolution *nor contrary to the Constitution of the United States* * * * shall remain in force until the Congress of the United States shall otherwise determine."

Whatever may be said of the wisdom of this Constitutional provision, which probably seemed wise to all the parties at the time, it does not lack clearness and is not open to the charge of ambiguity.

## VIII.

### The Insular Decisions and their Bearing on the Case at Bar.

The learned counsel draws a distinction between these and the present case and also draws much apparent comfort therefrom. First, he claims that the cases are very different; second, that the decisions do him no harm; finally, that they give countenance to his theory that the Constitution does not apply. In other words, they are strongly in his favor.

It will readily be conceded that in certain respects the decision of this Court in the Porto Rico cases, applying as it does to a different state of facts from those now presented, leaves room for much drawing of distinctions.

The effect of a mere Treaty, not followed by an Act of Congress, is not involved here since no Treaty calls for examination. What the Treaty may do by its own action, to what extent that action may be conclusive without the interposition of Congress, how far the "'Supreme Law of the land" as established by contract with a foreign power may be displaced, modified or superseded by an Act of Congress,—another supreme law,—may be interesting to consider, and yet unimportant to decide where the cession of foreign territory was made to and accepted by our Government without any Treaty at all. The well-nigh omnipotent power of Congress controls the operation and fixes the terms upon which our Government will accept the surrender of a foreign nationality and take upon itself the new responsibilities, moral, financial and political which the transfer necessarily implies. In fact, it is quite easy to see that the learned counsel is entirely right in his assumption that the Insular decisions present different questions from those which are now before the Court.

But—and therein we do not expect the hearty concurrence of our learned friends—it must be found on

examination that the questions above referred to were the only ones which caused this learned Court so much embarrassment in reaching a satisfactory conclusion and made it impossible for its members to unite in a harmonious declaration of the law.

Here we have no complication arising from the terms of a Treaty, no solicitude about a new population transferred, without its consent, to a new master, no question as to whether such a population must be treated with that humanity which mitigates even the power of Congress. So far does this solicitude extend that one of the learned Justices (182 U. S., p. 282) suggested (without deciding) that there was a stronger power, perhaps, in the unwritten law which would restrain our Federal Legislature should it attempt to deprive the newly adopted members of our household of those inborn, natural privileges which belong to men because they are men, who may claim without a special declaration what nature intended that they should enjoy. In other words, Congress may do much but its powers are limited to *doing good*—they are able to enlarge, not to shackle liberty; to enfranchise, not to enslave; to promote the pursuit of happiness, not to hinder it.

How different all this from the case now before the Court. The nice and delicate questions arising as to the functions of the treaty-making power are eliminated—no suspicion can be entertained of the motives of the Legislature, for it has generously in express terms extended the mantle of the Constitution to the new territory, reserving nothing, withholding nothing—nay, more; it has, if the learned counsel from Hawaii is correct, given the Hawaiians all that they asked for and in the form dictated by themselves.

It was *they* who offered all they had on condition that they should receive the benefits of our Magna Charta. They were unwilling, apparently, to leave Congress any latitude or discretion in its extension of the rights of liberty, and insisted upon the whole Constitution as part of the imme-

diate consideration of the transfer. Nor has the Court in this case to consider how far the subsequent Act of Congress conflicts with the Treaty, to what extent the Act and the Treaty might work harmoniously, how far the status created by the Treaty was modified, to what extent the Treaty made the newcomers citizens, or subjects, or left them aliens. Surely, if all these and other difficulties specially incident to the Porto Rican cases had been eliminated, it is out of the counsel's power, or ours, to say that this Court would have experienced any difficulty in deciding the Insular cases. In other words, if those cases had been very different from what they are, they might have been easily decided.

The difference in legal status between the treaty-acquired Spanish possessions and Congress-annexed Hawaii is stated *in terms* by the eminent and learned Mr. Justice Gray in *Downes* v. *Bidwell*, 182 U. S.:

> "The cases now before the Court do not touch the authority of the United States over the territories in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, *and the Territories of Alaska and Hawaii;* but they relate to *territory in the broader sense, acquired by the United States by war with a foreign State.* * * * " (p. 345).
>
> "The Civil Government of the United States cannot extend immediately, and of its own force, over territory acquired by war (*ibid*). * * * The government and disposition of territory so acquired belong to the Government of the United States, consisting of the President, the Senate elected by the States and the House of Representatives, chosen by and immediately representing the people of the United States" (p. 346).

Owing to the importance of the Insular cases and the relation which the decisions are claimed to have to this

case, we will not apologize for analyzing them in some detail.

The four dissenting Justices in those cases believe, as we understand their opinions, the Constitution to have the same effect whether extended by Congressional statute or not. Consequently it is unnecessary to examine the opinions in detail, since we believe their reasoning to be altogether in favor of sustaining the judgment herein, irrespective of questions as to the precise language of the Act of Annexation, the theory of the minority being that all the provisions in favor of human liberty are equally binding upon Congress in all territory over which our flag waves in sovereign dominion.

On the other hand, because of the somewhat different standpoints from which the questions involved were viewed by the learned Justices who wrote for the majority, it will be necessary to consider separately the opinion of Mr. Justice Brown, who announced the judgment of the Court, and that of Mr. Justice White, with whom concurred Justices Shiras, Gray, and McKenna, for the purpose of ascertaining whether anything contained in either opinion militates against our view, or whether, on the contrary, the underlying philosophy of both is not in entire harmony with our position.

Our treating these cases (Insular cases) in what may seem a somewhat fragmentary manner rather than by formulating a definite set of propositions, is due to the fact set forth in the note of the Reporter (182 U. S., 244 note). "Thus it is seen that there is no opinion in which a majority of the Court concurred."

## IX.

### Mr. Justice Brown's Opinion.

The theory of this opinion may, we respectfully submit, be embodied in the two following propositions:

I.—The Constitution was made for the States by the States themselves, and has relation to them alone, except that where all power is withheld from Congress by positive prohibitions, the territories incidentally benefit thereby, not because the Constitution applies directly to them, *but because Congress has no jurisdiction over certain specifically prohibited matters.*

II.—*Where the Congress by legislation extends the Constitution, however, it becomes applicable as a Constitution to the very territory itself, that is to say, it is positively, actively and irrevocably in force.*

The second proposition is directly applicable here.

This proposition cannot be reconciled with any idea that the words "nor contrary to the Constitution" contained in the Act annexing the islands, are merely declaratory of rights which would exist in any event without any expression by Congress.

The Territorial Jury Cases, so naturally ignored by counsel for the Government, seem altogether in point and logically decisive of the case at bar. They are cited with approval in the opinion under consideration as sustaining the second of the above propositions.

These cases, Justice Brown holds, decide:

> "That *where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.*" (Downes Case, 182 U. S., 271.)

Now what on the other hand does Mr. Justice Brown say as to territories to which Congress has not extended the Constitution?

> "To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all irrespective of time or place and such as are operative only 'throughout the United States' or among the several States."
>
> "Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the compentency of Congress to pass a bill of that description. *Perhaps,* the same remark may apply to the First Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.
>
> "Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States,' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' *by which term we understand the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them.*" (Downes Case, 182 U. S., 276-277.)

**In these few lines we have the fundamental postulates of Justice Brown's opinion.**

The following interesting passage from this opinion has been cited by the learned Solicitor-General as indicating a belief that where the Constitution *is not extended* jury trial might be dispensed with.

> " We suggest without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence, * * * which are peculiar to the Anglo-Saxon jurisprudence, and some of which have already been held by the States to be *unnecessary* to the proper protection of individuals." (Downes Case, 182 U. S., 282-283.)

It should be remarked that Mr. Justice Brown's position in effect admits that all the amendments save perhaps the so-called common law ones (4th, 5th, 6th, 7th) may apply to the government in all territories without any congressional extension. If this be so then is it not obvious that an extension in terms must have some additional effect, since in Utah these same remedial rights (which when subsequently admitted into the Union that State dispensed with) were held inviolate in the Territory because of the extension of the Constitution there by statute.

It is elementary that all the language of a statute must be given effect. To ignore in the very Act of Annexation the words " nor contrary to the Constitution " sets at naught this salutary rule.

As the learned Justice says, speaking of Springville *v.* Thomas (166 U. S., p. 707), which held that the amendment was in force in that territory (Utah):

> " It was held that a verdict returned by less than the whole number of jurors was invalid, because in contravention of the VIIth Amendment to the Constitution and the Act of Congress of April 7, 1874, C. 80, 18 Stat., 27, which provides ' that no

party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.'

"It was also intimated that Congress 'could not impart the power to change the Constitutional rule,' which was obviously true with respect to Utah, since the Organic Act of that territory had expressly extended to it the Constitution and laws of the United States. As we have already held, that provision once made could not be withdrawn. If the Constitution could be withdrawn directly, it could be nullified indirectly by acts passed inconsistent with it. The Constitution would thus cease to exist as such and become of no greater authority than an ordinary act of Congress. In Am. Pub. Co. *v.* Fisher, 166 U. S., 464, a similar law providing for majority verdicts was put upon the express ground above stated, that the Organic Act of Utah extended the Constitution over that territory. These rulings were repeated in Thompson *v.* Utah, 170 U. S., 343, and applied to felonies committed before the territory became a State, *although the State Constitution continued the same provision.*"

*Downes* Case, 182 U. S., pp. 269-270.

This clearly is authority for the proposition that congressional extension carries with it the so-called common law amendments. If not, then it does nothing, the other amendments being admittedly applicable there (Solicitor-General's Brief on submision, p. 18).

It is quite evident from an examination of the Springville case that it was because it conflicted with the VIIth Amendment (whether operating by its own force or by congressional extension), and not with any mere statute that the territorial act dispensing with unanimity was held invalid.

This Court there said:

"The Supreme Court of the Territory held in Hess *v.* White, 9 Utah, 61 (and the decision was folowed in these cases), that the Act of Congress of September 9, 1850, 9 Stat., 453 C. 51, Sec. 6, the organic act of the Territory vested in the terri-

torial legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. But defendants contended that the act of Congress as thus interpreted was in violation of the Seventh Amendment and the validity of the act was in that way drawn in question. In the view which the Supreme Court took of the act it was obliged to subject it to the test of the Constitution, and accordingly in deciding that the Seventh Amendment did not require unanimity of action, the *Court held in effect that the Act of Congress was constitutional, although it empowered the territorial legislature to provide for verdicts by less than the whole number of jurors.*"

" The question involved was not matter of construction of the territorial act, but the court discussed its validity, and this depended *on the validity of the act of Congress giving it the scope which the court attributed to it.*"

"In this there was error. In our opinion the VIIth Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases *and the act of Congress could not impart the power to change the Constitutional rule,* and could not be treated as attempting to do so." (Springville *v.* Thomas, 166 U. S., pp. 708-709.)

Another reason conclusively shows that the application of the VII Amendment to Utah was the question in the case.

*The amounts involved being less than the jurisdictional amounts, the case could not have been entertained by this Court, save on the ground that a Constitutional question was involved.*

Cases holding that the States may dispense with trial by jury or indictment can have no relevancy to this case. The first eight amendments are admittedly applicable to the Federal Government and its agencies alone. The State Governments are the ultimate protectors of the

liberties of the citizen, and with the exception of the few instances, mainly provided for in the last three amendments (XIII, XIV, XV), the United States Courts cannot interfere.

Burgess Political Science and Constitutional Law, Vol. I.

Hence we fail to see the relevancy of the citation by counsel of Hurtado *v.* California, 110 U. S., or Maxwell *v.* Dowe, 176 U. S. The following citation demonstrates their utter inapplicability.

In Am. Pub. Co. *v.* Fisher, 166 U. S., 467-468, Judge Brewer, delivering the opinion of the Court, said:

> "Therefore, either the seventh amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by a jury and nullified any act of its Legislature, etc." * * * "*In order to guard against any misapprehension, it may be proper to say that the power of a State to change the rule in respect to unanimity of juries is not before us for consideration.* Walker *v.* Sauvinet, 92 U. S., 90. Hurtado *v.* Cal., 110 U. S., 516."

It has thus been shown that it was not because of inconsistency with Congressional legislation that the Utah law permitting conviction without unanimity was held invalid by this Court because the legislative assembly had full legislative power, and the Territorial Supreme Court had held that Congress intended to impart the power to pass the very Act in question. It was declared invalid because it was "inconsistent with the Constitution and laws of the United States." Revised Statutes U. S. §1851, *vide infra,* p. 48.

Thus as the Supreme Court of the Territory of Utah said:

> "It is apparent that the sole question here is whether the provision for a verdict by three-fourths of the jury in a civil case was a rightful subject of legislation *consistent with the Constitution of*

> *the United States providing that the right to trial by jury shall be preserved.* In other words, do the words "trial by jury" as used in the VIIth Amendment to the Constitution mean a jury which renders its verdict by the unanimous action of its twelve members?" Hess *v.* White, 9 Utah, 67.

On the theory announced by Mr. Justice Brown in the opinion of the Court (Downes case), the case at bar is on all fours with that of Utah.

Extension of the Constitution by Congress thus has some active positive effect; otherwise, in the cases cited by Mr. Justice Brown, if the statutory phrase in the Territorial Act "consistent with the Constitution" were merely declaratory, as counsel for Hawaii here contend the language of the Act of Annexation "nor contrary to the Constitution" to be, all the discussions as to the effect of extension would have been entirely unnecessary. The extension by Congress, to be of any effect, must of necessity secure to the people of the territories rights which in the absence of such affirmative extension might have been denied them. The right involved in the Territorial Jury Cases is the very same right here brought in question—trial by jury.

The application by Congress of the Constitution has the same effect as a specific enactment of a law providing for jury trial, etc., save that the former is irrepealable.

> "In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary *either* to extend the Constitution and laws of the United States over them, *or* to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of *habeas corpus* as well as other *privileges of the bill of rights.*"
>
> 182 U. S., 279.

Thus, we respectfully submit, it has been demonstrated with as much certainty as any proposition resting on authority and precedent can be, that on the theory expounded by Mr. Justice Brown in the opinion of the

Court in Downes *v.* Bidwell the extension of the Constitution to new territory confers upon the inhabitants the right to trial by jury. And manifestly such must in this case have been the intention of Congress, moved by a desire to free Hawaii from all anxiety concerning the much mooted question as to what rights, if any, went into the territories to which Congress had not extended the Constitution.

To assume that Congress used this plain language for the purpose of making confusion worse confounded, is unreasonable and unnecessary.

It is idle to deplore in advance the results which might have followed in the Philippines were jury trial carried there by the Constitution *ex proprio vigore*, because such considerations are wholly alien to the case at bar.

If Congress extended the Constitution to Hawaii and has not done so in the territory acquired by the Treaty of Paris, is it not fair to assume that Congress meant to distinguish between the two? Yet in spite of the language of the Act, the Solicitor-General argues that the Constitution had no more effect in Hawaii than in the Philippines and Porto Rico. The adoption by this court of such a construction could not but stultify the intelligence and paralyze the mandate of the American Congress.

> "The liberality of Congress *in legislating the Constitution into all our contiguous territories* has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression." Downes Case, p. 286.

The next thing to be noted about the position of the Court as stated by Mr. Justice Brown in the extracts given above, is that in all cases where there is no legislative provision extending the Constitution, the result reached by Justices Brown and White is precisely the same, *i. e.*, that in all unincorporated territory the rights

of the inhabitants are safeguarded, if at all, only by reason of the general negative provisions of the Constitution.

On Justice Brown's theory the inhabitants would have protection because of the impotency of Congress in certain respects, *i. e.*, they would have immunities.

While on Justice White's theory these negative provisions of the Constitution apply to them directly because they were intended so to apply and the Constitution was made for all the territory of the United States as well as for the States themselves; in other words, the people everywhere have positive Constitutional rights.

A like result is thus reached by somewhat different chains of reasoning. The divergence of these theories may, perhaps be claimed to lead to different conclusions as to the effect consequent upon extending the Constitution by Act of Congress. If such is not the case, however, as we believe will logically appear, our contention is equally deducible from either opinion.

The opinion of the Court in the Downes Case maintains that the Constitution can be extended *as a Constitution* (*i. e., something above legislative interference and which carries with it certain positive rights, among them trial by jury.*) This extension having taken place by the Act of Annexation, the case cannot be distinguished from the Jury cases in other territories, quoted and approved by all the Justices in the Insular Cases.

It may be well before proceeding to an analysis of the concurring opinion to dispose here of a case cited by our opponents, but which seems to us wholly outside the present question. The references made to it in the opinion under consideration admirably demonstrate its inapplicability. (*In re* Ross, 140 U. S., 453.)

The philosophy of the Ross case is summed up in the sentence quoted below from the opinion in the Downes case, which shows that the Consular Courts in Japan were merely concessions wrung from a foreign state in a foreign land wholly outside of the power of Congress. These tribunals were a substitute for Japanese courts which might otherwise have tried

American citizens as they saw fit. The Japanese system did not at that time commend itself to our ideas of the trial and punishment of crime. Had the Hawaiian law provided for trial by walking on red-hot irons and punishment by disemboweling, will it be questioned that our courts could and would by virtue of the Newlands Resolutions have declared it unconstitutional? But Japan might well have done so and the only remedy, should our citizens have suffered, would have been *war* or diplomacy, certainly not *habeas corpus. The vital difference is that the Consular Courts were acting wholly by permission of Japan, the Hawaiian courts were acting wholly by permission of the United States Congress.*

> "The guarantees it (the Constitution) affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, *and not to residents and temporary sojourners abroad.*" Quoted by Mr. Justice Brown in Downes Case, 269.

As Justice Brown said speaking of the Ross case and the rule there established that

> "the Constitution does not apply *to foreign countries* or to trials therein conducted, and that Congress may lawfully provide for such trials before Consular tribunals, without the intervention of a grand or petit jury." Downes Case, 270.

This would seem to demonstrate the futility of here invoking the Ross case as in any way pertinent.

It now remains to be seen what effect extension of the Constitution by Congress has in the light of the theory of the concurring opinion delivered by Mr. Justice White and assented to by Justices Shiras, McKenna and Gray.

## X.

## The Theory of the Concurring Opinion.

The theory of that opinion assumes as a basis that the Constitution is all-pervading and everywhere applicable to Governmental action, the sole question being as to what provisions apply to territory in various stages of assimilation (or non-assimilation) by the Nation. Therefore the inquiry is not whether the Constitution has been extended, but whether territory is incorporated into the United States; not whether certain provisions apply because Congress extended the Constitution, but whether Congress has so acted as to place the territory in a position where those provisions of the Constitution must apply.

> "Every function of the Government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable." (Downes Case, p. 289.) * * *
>
> "From these conceded propositions, it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and *subject to its applicable limitations*, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico.
>
> "And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relation to the United States." *Id.*, 293. * * *
>
> "Albeit, as a general rule, the *status* of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject that such an inquiry is

necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions, to do particular acts. In the nature of things limitations of this character cannot under any circumstances be transcended, because of the complete absence of power."

"The distinction which exists between the two characters of restrictions, those which regulate a granted power and those which withdraw all authority on a particular subject, has in effect been always conceded even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories and was not operative in such districts of country." (*Id.*, 294, 295.)

This quotation states substantially Mr. Justice White's position.

We must infer from his treatment of the Utah cases that he deems jury trial not to be in constitutional force until territory becomes incorporated (182 U. S., 293).

If this be the case the inquiry which must be answered on Mr. Justice White's theory is as to whether the Newlands Act incorporated Hawaii. If it did, then Mankichi is entitled to trial by jury.

Since Mr. Justice White has not indicated any special provisions save the general negations in the Amendments, applicable to unincorporated territory, we are brought to the result before indicated while analyzing Mr. Justice Brown's proposition that so far as such territories and the constitutional rights of their inhabitants are concerned, the determination reached by both judges in this particular, is the same.

Thus the only case in which the common conclusions reached by different trains of reasoning may perhaps eventuate in different results is in the case of the "extension" by Congress of the Constitution. But while the

extension in Mr. Justice Brown's theory confers constitutional rights directly and incorporation has the like effect in Justice White's theory, *nevertheless,* in the latter's theory *extension is evidence of incorporation,* and hence by proving or indicating the intention of Congress to incorporate territory may, by indirection, give rise to the same results as follow from the fact of extension.

Thus if extension were *conclusive evidence* of the intention of Congress to bring about incorporation, we would reduce the apparent conflict between the eminent jurists to a logomachy or mere word battle.

Justices Brown and White agree:

(1). That all general Constitutional prohibitions were in force in Hawaii as soon as annexed.

(2). Mr. Justice Brown maintains that if the Constitution was extended by Congress, it would invalidate trials other than by common law juries.

(3). Mr. Justice White indicates that Hawaii must be incorporated in order that its inhabitants may have that right, arguing that "incorporation" is a question of the intention of Congress and intimating that "extension" is evidentiary, at least to some extent, of that intention.

Downes Case, p. 293.

If in the case of Hawaii the phrase "nor contrary to the constitution," is sufficient evidence of extension, the decision below must be sustained, both on Mr. Justice Brown's theory and on Mr. Justice White's—to wit, extension of the Constitution, either directly or through creating the *status incorporation,* made applicable to Hawaii the Fifth and Sixth Amendments and hence the trial of Mankichi was contrary to the Constitution and the writ was properly sustained.

It must be first noted that the learned Mr. Justice White makes a distinction between a Treaty and an act of Congress as to the incorporation of territory. He says (Downes Case, 319):

> "When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the *treaty-making power* was always deemed to be devoid of authority to incorporate territory into the United States *without the assent, express or implied, of Congress,* and that no question to the contrary has ever been even mooted."

It is perhaps because mindful of this distinction that counsel for Hawaii insist upon speaking of the Joint Resolution of Congress annexing the islands as a Treaty. In view of the fact that the constitutional characteristic of a Treaty is that the House of Representatives has no part in its making, which is precisely why Mr. Justice White thinks a Treaty cannot incorporate new territory, it cannot add anything to Hawaii's case to call a Joint Resolution a Treaty, as we have heretofore demonstrated at considerable length out of deference to the argument of the eminent counsel. By whatever name called, it was and always will be the action of the Congress of the United States, and not of the treaty-making power.

The Joint Resolution admitting Texas had it had only the force of a treaty could not have conferred Statehood upon that country (see Downes Case, p. 336).

Therefore, in this case the first requisite for incorporation is present (according to Justice White's theory), viz., Congressional action. Congress certainly not only assented to the transfer, *but itself directly annexed and forthwith applied the Constitution as the test of all existing municipal law.*

The preliminary requisite to incorporation thus exists, and the remaining inquiry is as to the effect of the language of the Act of Annexation itself as evidence of an intention to incorporate.

In substance it is the same as that applied to the territories generally in limiting their legislative authority, *vide supra,* and taken alone should settle the question.

The Government will have to show from other clauses in the Newlands Resolution that the language does not

mean in this case exactly what its equivalent means in the Revised Statutes. *Vide infra,* 48.

The sole clause upon which the Government can rely to maintain its contention that the Act of July, 1898, did not incorporate the islands is that maintaining the eixsting custom duties. They may lean upon Justice White's remark as to the Florida Treaty (Downes' Case, p. 334).

> "This Treaty also, it is to be remarked, contained discriminatory commercial provisions incompatible with the conception of immediate incorporation arising from the Treaty," etc.

The principle as to treaties, says Justice White, is (Downes' Case, p. 336):

> "That the condition of a Treaty, *when expressly or implicitly ratified by Congress,* becomes the measure by which the rights arising from the Treaty are to be adjusted."

The Treaty promises and the sanction of Congress executes its promise.

But Congress has also power to incorporate directly:

> "Take for instance the simultaneous acquisition and admission of Texas, which was admitted into the Union as a State by joint resolution of Congress instead of by Treaty. To what grant of power under the Constitution can this action be referred, unless it be admitted that Congress is vested with the right to determine when incorporation arises? It cannot be traced to the authority conferred on Congress to admit new States, for to adopt that theory would be to presuppose that this power gave the prerogative of conferring statehood on wholly foreign territory. But this I have incidentally shown is a mistaken conception. Hence *it must be that the action of Congress at one and the same time fulfilled the function of incorporation and this being so the privilege of statehood was added.*" **(p. 336.)**

Congress cannot, as we understand the foregoing, "confer statehood on foreign territory," but if it attempts to do so it will be assumed that it first incorporated and having by incorporation conferred upon itself the power of admission, it "incidentally" admits a new State.

Examination of Mr. Justice White's opinion fails to disclose any criterion by which to judge of what constitutes "incorporation as a territory."

As far as can be gathered from the Louisiana episode as discussed by him it consisted in action by Congress placing the new territory on somewhat the same footing with the Northwest Territory. This criterion must, however, fail because the Ordinance of 1787 was largely composed of grants of governmental powers and rights, while, as Justice White says of the District of Columbia, admittedly a part of the United States:

> "At the present time the people of the district live under a local government totally devoid of local representation," etc. (p. 290).

Hence that portion of the Ordinance conferring political rights is not necessary to incorporation.

Nor was the anti-slavery clause of that famous instrument made applicable to much of the Territory afterwards incorporated.

What then is necessary to incorporation?

The sole question here being whether the other clauses of the Joint Resolution prevented the Constitutional clause from having the full effect contended for, and the only other clause which could be invoked to prove that Hawaii remained unincorporated (with one exception to be hereafter noted) being the customs clause, we have narrowed the inquiry down to this one point:

*May a territory be incorporated and yet have a commercial system at variance with the uniformity clause?*

An answer to this question seems to solve this case, as far as the views expressed by the concurring Justices in the Insular Cases are concerned.

The following quotation from Justice White's opinion

would indicate that such a customs arrangement is consistent with incorporation. Note especially the following (p. 331):

> "For the purposes of government, the District of Louisiana was attached to the territory of Indiana which had been carved out of the Northwest Territory. Although the area described as Orleans Territory was thus under the authority of a territorial government, and many laws of the United States had been extended by act of Congress to it, it was manifest that Mr. Jefferson thought that the requirement of the treaty that it should be incorporated into the United States had not been complied with." * * *
>
> "At the following session of Congress on March 2, 1805, 2 Stat., 322, c. 23, an act was approved, which, among other purposes, doubtless was intended to fulfill the hope expressed by Mr. Jefferson in the letter just quoted. That act, in the first section, provided that the inhabitants of the Territory of Orleans '*shall be entitled to and enjoy all* the rights, privileges and advantages secured by the said ordinance,' (that is, the ordinance of 1787), 'and now enjoyed by the people of the Mississippi Territory.' As will be remembered, the ordinance of 1787 had been extended to that territory. 1 Stat., 550, c. 28. Thus, strictly in accord with the thought embodied in the amendments contemplated by Mr. Jefferson, citizenship was conferred, and the Territory of Orleans was incorporated into the United States to fulfill the requirements of the treaty, by placing it exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed. It is pertinent to recall that the treaty contained stipulations giving certain preferences and commercial privileges for a stated period to the vessels of French and Spanish subjects, and that even after the action of Congress above stated, this

> condition of the treaty continued to be enforced, thus demonstrating *that even after the incorporation of the territory,* the express provisions conferring a temporary right which the treaty had stipulated for and which Congress had recognized were not destroyed, the effect *being that incorporation as to such matter was for the time being in abeyance.*"
>
> Downes *v.* Bidwell, 182 U. S., p. 332.

It thus appears that a separate Customs system, inconsistent with uniformity, is entirely compatible with incorporation. Hence any argument derived from the Customs clause in the Joint Resolution cannot avail to support the contentions of Hawaii. The counsel for the Territory must seek reliance upon some other provision of the Joint Resolution if they would avoid the plain inference that Congress intended to incorporate Hawaii and did so by applying the Constitution to those islands.

The learned Solicitor-General has discovered another clause in the Newlands Act upon which to base his fundamental proposition that Congress meant nothing when it used the phrase "nor contrary to the Constitution."

After quoting the language of Mr. Justice White in Downes *v.* Bidwell:

> "By joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the Government of Hawaii appeared, by which the Hawaiian Islands were given the status of an incorporated territory."

He goes on to say (Brief on Submission, p. 11):

> "In this connection, it may be well to point out that the provision that 'no Chinese shall be allowed to enter the United States from the Hawaiian Islands,' *is totally inconsistent with the theory that Congress intended by the resolution to incor-*

*porate the islands as an integral part of the United States, or extend the Constitution over them."*

The soundness of this theory is easily tested by a reference to the so-called Organic Act, April 30, 1900, which is claimed to have so thoroughly incorporated the islands. If the same provision is found there, it would indicate that this Act equally with the Newlands Resolution "is totally inconsistent" with incorporation, and our distinguished opponents must elect to abandon Hawaii to the limbo of unincorporated territories, or to radically remodel their theory as to incorporation and extension. An examination of that Act (April 30, 1900,) actually discloses the following provision:

> Sec. 101. after giving resident Chinamen one year within which to get a certificate provides *" that no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory or District of the United States from the Hawaiian Islands."*

It thus appears that even by the terms of the so-called Organic Act, which is admitted by our learned opponents to have incorporated Hawaii into the United States, Chinese residents of the Islands were cut off from access to the other portions of the United States, a right heretofore accorded to all men in our broad domain. Very essential rights may thus be withheld without, in the view of our eminent opponents, affecting the fact of incorporation.

If Hawaii was not incorporated by the Act of July 7, 1898 (Joint Resolution), it is still unincorporated, because to-day it has not all the rights of the people of other Territories of the United States.

Therefore, the same objection urged so vehemently against the effect of the Newlands Act applies with equal force to the so-called Organic Act.

The Newlands Act gave to the Islands a government and system of laws. The later Act simply detailed and modified the machinery of government, maintaining with a few additional exceptions the same legis-

lation, but every legal, governmental, or judicial act was as much dependent upon the sovereignty of the United States after the transfer of sovereignty under the Newlands Resolution as subsequent to the Act of 1900.

> "In the exercise of the power thus conferred "upon him by the joint resolution *the President* "*hereby directs* that the civil, Judicial and mili- "tary powers in question shall be exercised by the "officers of the Republic of Hawaii as it *existed* "just prior to the transfer of sovereignty, *subject* "*to his power to remove such officers and to fill* "*vacancies.*" Address of Minister Sewall, Solicitor General's Brief on Submission, p. 40.

The Act of Annexation provided for Hawaii a code of laws which were to operate in conformity with the Constitution. The fact that it expressly maintained Hawaiian law is of no more significance than if it had extended the laws of Oregon to Hawaii. *There was in Hawaii a complete and adequate legal system, operating by virtue of the action of Congress and the sanction of the United States.*

In two respects only did the inhabitants have under the Newlands Act fewer civil rights than those in other admittedly incorporated territory of the United States. Special duties and restriction on Chinese emigration existed in Hawaii. The first of these, as we have seen in examining Mr. Justice White's opinion, has been declared compatible with incorporation; the second has been retained in the Act which Counsel for Hawaii admit fully incorporated the Islands.

We venture to suggest that much difficulty is cleared away by defining somewhat more precisely than has been done heretofore the meaning of incorporation.

Incorporated territory, as we understand the doctrine of the concurring opinion in Downes *v.* Bidwell, is territory out of which Congress has power, under the Constitution, to carve new states.

Incorporation, according to the advocates of that

theory, is not brought about by mere treaty annexation; otherwise many alien and altogether unassimilable peoples might be brought in to form part of the United States—that land composed of states actual and in embryo, the latter called territories, out of which Congress may engender new states at will, as it did out of the Northwest Territory.

The test then of incorporation seems to be whether Congress has taken some action in regard thereto, manifesting an intention that such territory should be accorded all the privileges conferred by the Constitution upon territory awaiting statehood, and which Congress may without further action admit as an adult member of the Union.

The political philosophy of the adherents of the incorporation doctrine thus becomes clear. Congress alone can judge what peoples are by race, national character and institutions fitted to become an integral part of the United States forever as distinguished from inhabitants of merely appurtenant territory which may have been incidentally, accidentally or temporarily acquired.

Any action on part of Congress manifesting such intention incorporates. (Downes *v.* Bidwell concurring opinion *passim*).

What action then more conclusive than an extension of the Constitution? Such extension confers all constitutional rights which any peoples under United States sovereignty not yet actually admitted to statehood can have and virtually declares the belief of Congress that the new peoples are assimilable.

Thus viewed, the "incorporation theory" seems to be another phase or expression of the "extension theory." On either theory an extension of the Constitution by Congress confers new rights upon the inhabitants, and brings them within the operation of additional clauses of the Constitution. When Congress expressly extends the Constitution it impliedly incorporates, and when it incorporates in any other way (as in extending provisions of Northwest Ordinance or of other laws, etc.) it impliedly extends the Constitution.

The advocates of either theory thus unite in the fundamental premise that, by virtue of Congressional action applying the Constitution to newly acquired territory, people under the jurisdiction of the United States may be endowed with Constitutional rights which they would not possess by virtue of the Constitution alone and unaccompanied by such legislation.

The Act of July 7, 1898—Newlands Resolution—has met the requirements of both schools, and we respectfully submit that the reasoning of the insular opinions (majority and minority) support our contention.

It may be well in concluding on this point, to note the suggestion of the Solicitor-General that the words of the act do not extend the Constitution, and indicating his belief that incorporation and extension are concomitants.

He says (Brief, p. 17):

> "The words ('nor contrary to the Constitution') had a meaning and the meaning is plain (*i. e.*, he argues that they mean nothing). *They were not employed to extend the Constitution. Before the islands could be incorporated and the Constitution, with all its limitations, extended it was necessary that a new government should be framed and an organic act passed.*"

This would indicate that the Solicitor considered extension and incorporation as cause and effect.

Certainly the language of the Act of Annexation is quite as strong as that heretofore employed by Congress in applying the Constitution as a touchstone for testing the validity of Territorial Laws. The Revised Statutes in the chapter "Provisions common to all territories," provide:

> §1851: "The legislative power of every territory shall extend to all rightful subjects of legislation *not inconsistent with the Constitution and laws of the United States.*"

The Act of April 30, 1900, also continuing in force the Municipal law of Hawaii provides:

> §6. "That the laws of Hawaii *not inconsistent with the Constitution* or laws of the United States or the provisions of this Act shall continue in force."
>
> §5. "That the Constitution and except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States—provided that * * * (Chinese laws)—shall not apply."

This language is the absolute equivalent of that of the Joint Resolution, "nor contrary to the Constitution." Yet we are told that the former extended the Constitution while the latter did not. If this be true the word "inconsistent" must have some occult meaning which the human mind has not heretofore grasped. We have searched in vain for a key to the mystery, which seems more unintelligible than the alleged Baconian cipher for which the immortal lines of the alleged Shakespeare are said to have served as a mere foil.

## XI.

### Conditions in Hawaii Make Evident the Intention of Congress.

The situation of Hawaii was such that Congress evidently intended to incorporate the islands into the United States.

The intention of Congress becomes quite evident when we consider the existing situation in that country and contrast it with that in the territories ceded by Spain. Hawaii had been for over half a century governed in fact, if not in name, by institutions entirely similar to our own.

Its system of jurisprudence was that of the common law. The law provides (§1109, Civil Laws):

> "The common law of England as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases except as otherwise expressly provided by the Hawaiian Constitution or laws," etc.

Its judicial system and civil laws are all built on a common law foundation. The Constitution is framed on the model of our own, except that the substance of the first ten amendments of the United States Constitution is placed in the first article of the Hawaiian Constitution.

Article I, Section 3, provides:

> "Subject to such changes as the legislature may from time to time make in the number of jurors for the trial of any case, and concerning the number required to agree to a verdict and the manner in which the jury may be selected, etc., the right of trial by jury shall remain inviolable, except in action for debt or assumpsit in which the amount claimed does not exceed one hundred dollars, and such offenses less than felonious as may be designated by law. And provided that no capital case shall be tried by a jury of less than twelve men."

Freedom of speech and of the press, habeas corpus, previous conviction privilege of accused, right of assembly, freedom from quartering soldiers, etc., are guaranteed in language almost identical with that of our own Constitution.

Under these circumstances the alarm manifested by the eminent Attorney-General of Hawaii at the thought of having the American Constitutional system of trial enforced in the islands causes us some surprise. As a matter of fact, unanimous verdict in capital cases was required by the law of 1842 and this remained the rule down to 1847, when the present law allowing conviction upon agreement by nine jurors was passed.

> Republic of Hawaii *v.* Edwards, 11 Haw., 571.

Thus the only innovation introduced by the application of the Constitution is that of the Grand Jury, and in a system based upon the common law, the difficulties of putting such a system into immediate operation are wholly imaginary as will appear from the cases cited hereinafter.

An argument *ab inconvenienti* is supposed to be afforded by the assumed *legal impracticability* of making the criminal procedure in Hawaii during this period conform to the requirements of the Fifth Amendment as to action by a "Grand Jury," in view of the fact that *no provision had been made by statute* for the empanelling and utilization of grand juries in that procedure.

In point of fact, however, it was *not* legally impracticable to organize and utilize grand juries in Hawaii during the period between the 7th day of July, 1898, the date of the signing of the Joint Resolution, and the 14th day of June, 1900, the date the Organic Act went into effect.

By making the Fifth Amendment applicable to and operative in Hawaii, the Joint Resolution itself *ipso facto* authorized and made legally practicable there whatever procedure is practically involved in the organizing of the grand jury, whose intervention the Fifth Amendment *makes an absolutely indispensable*

*condition* of the exercise of that criminal jurisdiction in cases of "capital or otherwise infamous crime," which the Joint Resolution unquestionably vested in the Hawaiian courts adopted from the old regime, by its express provision that

> "the municipal legislation of the Hawaiian Islands not enacted for the fulfillment of . . . treaties . . . extinguished and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

There can be no question that, as legislation by the new sovereign, this provision was in legal force and effect, the precise equivalent of an act of Congress explicitly *duplicating in literal detail* the criminal statutes of the Hawaiian Islands, as *amended* by the Constitutional provisions requiring a presentment or indictment of a grand jury in every prosecution for a capital or otherwise infamous crime.

The quoted clause of the Joint Resolution, read in connection with the Hawaiian "legislation" and American "constitution" which said clause refers to, adopts, and by necessary implication makes a part of itself, expresses, with absolute certainty and distinctness, the will and intention of Congress that the provisionally continued Hawaiian courts shall exercise the specified punitive jurisdiction over persons accused of capital and otherwise infamous crimes, and that the prosecution of such persons, on such accusations shall begin with a presentment or indictment of a grand jury. The legislative intention being thus clear, the program which it ordains is fully authorized and provided for.

That *Certum est quód certum reddi potest,* is, as, Broom says in his famous work on Legal Maxims, a maxim

> "Which sets forth a rule of logic (i. e., reason) as well as of law, and which is peculiarly applicable in construing a written instrument. A grant

shall be void if it be totally uncertain; but if the King's grant refers to another thing which is certain, it is sufficient; as, if he grant to a city all liberties which London has, without saying what liberties London has (Com. Dig. Grant, E. 14, S. 5; Finch, Law 49). And where the law requires a particular thing to be done, but does not limit any period within which it must be done, the act required must be done within a reasonable time; and a reasonable time is capable of being ascertained by evidence and, when ascertained, is as fixed and certain as if specified by Act of Parliament (per Lord Ellenborough, C. J., Palmer *v.* Moxon, 2 M. & S., 50; 28 E. C. L. R.).

Broom's Legal Maxims, 7th Am. Ed., p. 625.

Applying this principle, all the details *discoverable* by reference to the legislation and the constitution mentioned in the quoted clause of the joint resolution, are both in logic and in law to be deemed *enacted* by Congress precisely as if every syllable of those details had been actually and explicitly spelled out in the literal text of the resolution itself. Congress is not bound to refrain from this word-saving method of legislation by *reference;* and when, as in this instance, it has wisely indulged in it, every detail which is ascertainable by aid of the texts referred to, is as clearly and effectually enacted, then and there, as is any provision whose details are completely expressed in the text making the references.

In legal effect, accordingly, the Act of Annexation does certainly enact, both that the Hawaiian courts shall on occasion entertain prosecutions for capital and otherwise infamous crime, and, that no such prosecution shall be had unless on a presentment or indictment of a grand jury.

The *net result,* so to speak, of this legislation, is obviously this: that the courts shall, when necessary, empanel grand juries of the sort referred to by the provision in question—*i. e.,* the grand juries which the framers were familiar with under the common law sys-

tem derived from England,—and proceed with *such* prosecutions for capital or otherwise infamous crime, as such grand juries, so empaneled, shall have duly initiated by a presentment or indictment.

The use of these terms, grand jury, and presentment or indictment, in the Constitutional provision which the Joint Resolution incorporates into itself by adoption, carries with it all the essential details implied by the words in question in the legal system with reference to which the Constitution speaks. Whatever, therefore, of practice or regulation, is essential to the actual existence and functioning of the sort of grand jury made indispensable by the Fifth Amendment (and, therefore, by the Joint Resolution of which that Amendment is a part), is by necessary implication fully authorized and made legally practicable, by the enactment of such Joint Resolution itself.

This very proposition, that the requirement of the Constitution that prosecutions of this sort must be initiated by the presentment or indictment of a grand jury, by necessary implication gives to the courts invested with the jurisdiction to entertain such prosecutions, all powers and authority necessary for the organizing and utilizing of the grand jury,—this very proposition has been explicitly held and enforced by no less eminent an authority than Chief Justice Marshall, in the opinion quoted below; and the principle has been applied, to this very Hawaiian situation, by the Supreme Court of those Islands, in the opinion which is also quoted below.

In the case of the United States *v.* Hill (1 Brock., 156, 159), cited by this court in the Wilson and Clawson cases (114 U. S., 425 and 487), Chief Justice Marshall said:

> "It has been justly observed, that *no act of Congress directs grand juries, or defines their powers. By what authority, then, are they* SUMMONED, *and whence do they derive their powers?* The answer is that the laws of the United States *have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to*

*exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication."*

As the Supreme Court of Hawaii has said recently in passing upon this very point:

"Does this construction of the law mean, as has been so earnestly contended, that criminals should, of necessity, go unpunished, and that there was no protection to life and property on the Hawaiian Islands between the 7th day of July, 1898, the date of signing the Joint Resolution, and the 14th day of June, 1900, the date the Organic Act went into effect? Certainly not. During all of this period there was organized Government here; there were officers and courts, legally constituted, continued in office and existence by the order of President McKinley, under the authority given in the Joint Resolution. There was the great body of the municipal laws of the late republic 'not inconsistent with the resolution nor contrary to the constitution of the United States,' continued in force until Congress should otherwise direct. There was provision for a trial of twelve, and that part of the statute authorizing nine jurors to return a verdict could have been controlled by a simple direction, or instruction of the trial court, that there must be a unanimous verdict to convict and those additional safeguards to the life, liberty and property of the citizen prescribed by the Constitution of the United States were here in full force and vigor."

"Among the municipal laws of the Republic of Hawaii continued in force was Sec. 1109 of the Civil Laws, which provide that the common law of England, as ascertained by English and American decisions, is declared to be the common law of the Hawaiian Islands, except when changed by decisions, usage or law. The Circuit Court of the First Circuit was a Court of Record and of common

law jurisdiction, and on August 16th, 1898, had the undoubted power to issue an open venire and summons and empanel a grand jury in the manner provided by the rules of the common law."

"As Justice Cooley said: 'They assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation' (Weimer *v.* Banbury, Mich., 214)."

"Chief Justice Marshall, speaking of the authority of Courts to issue an open venire in the absence of any statute authorizing it and of the law at that time said, 'It has been justly observed that no act of Congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers?'

'The answer is, that the laws of the United States have erected Courts which are vested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indisputable implication.'

'But how far is this implication necessary and indisputable? The answer is obvious. Its necessity is co-extensive with the jurisdiction to which it is essential.' (United States *v.* Hill, 1 Brock., 159. See *ex parte* Wilson, 114 U. S., 425)."

"In *Clawson* v. *United States,* 114 U. S., 486, in approving the action of the Supreme Court of Utah, whose opinion sustained the action of a District Court of the territory in issuing an open venire for jurors, and who based its judgment not on any statute authorizing it, but the fact that such 'power was inherent in the Court, and was not forbidden by any statute in force in Utah,' said, 'We concur in this view, so far as the resort to open venire, after the exhaustion of the two hundred names, is concerned.'"

"The following authorities also support this proposition: 1 Chitty, Crim. Law., 518; 2 Hale, P. C., 265; Mackay *v.* People, 2 Cal., 13; Wilburn *v.* State, 21 Ark., 198, 201; Goodwin *v.* United States, 54 Pac., 432."

*Ex parte* Edwards, 13 Haw., 47.

Without further elaboration on this point, it is respectfully submitted that Congress knew that it was annexing a little America to the greater; that it was neither remarkable nor unnatural that the Constitution and its system of justice should have been put in force there. Hawaii was in as receptive a condition for Magna Carta rights as Utah in the past, or as Arizona and New Mexico to-day.

If it be sound theory that the surface of the earth is divided into territory "incorporated" into the United States and that which lies in the outer darkness, then it is quite evident that Congress, whatever its views as to Porto Rico or the Philippines, intended by the Joint Resolution to take Hawaii immediately out of the latter category.

It was never intended that the islands should be left in doubt or anxiety on that point.

## XII.

### The Natural Law Doctrine.

The proposition (relied upon by the Solicitor-General) that the language of the Joint Resolution does not affect the legal situation and leaves it just where it would have been had Congress been silent on the subject of the Constitution, is fallacious both in its premises and conclusion. The plain intention of the Newlands Act was to give to Hawaii every benefit which could be enjoyed by any territory under the sovereignty of the United States save that already enjoying actual Statehood.

Assuming, however, for the argument, that the words "nor contrary to the Constitution" are to be construed by this Court as a mere rhetorical flourish—*vox sed praeter nihil*—a mere *bonne bouche* for use in debate, nevertheless there is no such distinction between natural and artificial or remedial rights in the Constitution as contended for. The positive prohibitions against certain actions on the part of the Government of the United States are equally imperative whatever view the Court may take of the relative importance of the various provisions in question.

The prohibitions against the establishment of a religion, the infliction of cruel or unusual punishment, the taking of property without due process of law, and trying without a jury are equally plain and imperative. They must be given equally positive force. To justify an overriding of the plain language of the amendments by an appeal to the philosophy of natural rights is altogether inadmissible. The obvious mandate of the Constitution cannot be disregarded by invoking the shibboleths of a metaphysical system long since proven utterly without foundation and now hopelessly discredited. The right to trial by jury cannot be suppressed by invoking the shade of Rousseau.

We are extremely reluctant to follow the learned Solicitor-General into a discussion of the vague philosophic doctrine of natural law. We would be carried

far beyond the bounds of this case and embark upon a vast field with little hope of reaching any tangible results, nor do we believe it pertinent to the case in view of the language of the Act itself. It is only, therefore, for the purpose of indicating what seems to us an answer to the learned Solicitor's main proposition, that the Constitution, of its own force, without extension by Congress, carries with it to all peoples under United States sovereignty certain natural rights, as distinguished from artificial rights that we touch at all upon this speculative question.

The learned Solicitor-General, in arguing that the words of the Act of Annexation (Newlands Resolution) "nor contrary to the Constitution" are merely declaratory of a legal situation which would exist in their absence and which is totally unaffected by them, remarks:

> "These qualifying words were inserted in recognition of the fact that there are certain fundamental rights which the Constitution protects wherever the sovereignty of the United States extends. * * * But the right to be indicted by a grand jury and tried by a petit jury does not come within this category. The distinction between natural or fundamental rights, and artificial or remedial rights under the Constitution, is pointed out by Mr. Justice Brown in the opinion in the Downes Case, 182 U. S., 282."
>
> "We suggest, without intending to decide, that there may be a distinction between *certain natural rights enforced in the Constitution by prohibitions against interference with them and what may be termed artificial or remedial rights* which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property, to freedom of speech and of the press, to free access to courts of justice; to due process of law; and to an equal pro-

> tection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government; of the latter class, are the rights to citizenship, to suffrage (Minor *v.* Happersett, 21 Wallace, 162), and to the particular methods of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."

This passage when analyzed must be based upon one of two alternative theories.

(1) Either the natural rights spoken of by the learned Justice exist of themselves and wholly apart from the Constitution, deriving their sanction from a supposed law of nature and not from that instrument.

(2) Or the language of the Constitution itself protecting those rights is so broad and imperative as to be of universal application to governmental action in the specified cases.

If the former be the proper interpretation of this interesting passage, the questions which would arise in regard to it would not present problems of constitutional law at all, but questions of abstract philosophy. If there are certain rights which are protected because they are assumed to belong to the category of "natural rights," the question in each case would be as to whether such rights were "natural" or not. If they were they would be protected because of their inherent character, and if they were not, they would either have to rely upon positive man-made law for their sanction, or else be unprotected by any law.

In order, therefore, to ascertain what rights were natural and, therefore, entitled to immunity from attack by all the organs of the government, we would have to refer not to the law books, which deal only with positive law, but to treatises on philosophy from Aristotles' Politics (250, B. C.) down to Ritchie's "Natural

Rights' (1890, A. D.), with especial reference to Rousseau.

As almost every writer upon the subject has differed as to what natural rights actually are, following in his views the general ideals of the particular time in which he happened to live, we must respectfully submit that any appeal to natural rights at this day must prove utterly futile.

Ritchie on Natural Rights.

Nor do we at all believe that the learned Justice meant that certain rights were to be protected independently of constitutional and positive law simply because they were "natural." We incline to think the true meaning of the passage cited by the learned Solicitor-General to be that the positive prohibitions against all action upon the part of Congress in certain cases were intended for the protection of what were deemed natural rights, and that, consequently, some at least of that vague body of philosophic doctrine has been transplanted into the domain of positive law and given the dignity of constitutional adoption by being placed in the first eight amendments to the Constitution. Therefore, we submit, Mr. Justice Brown must refer to the same rights which he mentions in the following pasage:

> "To sustain the judgment in the case under consideration, it by no means, becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between *such prohibitions as go to the very root of the power of Congress to act at all*, irrespective of time or place, and such as are operative only throughout the United States or among the several States" (Downes Case, pp. 276-277).

This seems likewise to be the thought of Mr. Justice White, for he says in the following passage:

> "Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and

property of the citizen which are not mere regulations *as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts.*" (Downes Case, 182 U. S., page 294.)

Both of the learned Justices, therefore, appear to concur in the view that the positive prohibitions which go to the root of the power of Congress to perform certain acts are operative in all territory, and that such prohibitions may, perhaps, be distinguished from those other prohibitions which refer to remedial or common law rights.

The distinction made then is founded not upon a difference in the nature of the rights themselves, that is to say, as to whether they are natural or artificial, but upon the language of the prohibitions directed against the action of Congress.

This being established, let us examine the suggested distinction with a view of ascertaining its soundness, and whether any line of demarcation can be drawn between the absolute withdrawals of power from Congress and "the form and manner in which a conceded power may be exercised."

Mr. Justice Brown speaks of the right to due process of law and to immunity from unreasonable searches and seizures, as well as from cruel and unusual punishments, coupling them with freedom of conscience, freedom of the press, etc. Congress has the power to take property, to institute searches, to make seizures and to execute punishments. It is evident, therefore, that in no one of these instances does the prohibition go to the root of the power of Congress to perform the acts in question. It may authorize all these things, but when the Government takes property, it must do so by due process of law; when it institutes searches, they must be reasonable (that is to say, according to the canons of the common law), and when it visits punishments, they must be neither cruel nor unusual, as those words are understood in the

light of English and American common law and civilization.

It thus appears that in the seven illustrations given by the learned Justice of rights with which Congress may in no event interfere, three are protected by the prohibitions which do not "go to the root of the power of Congress" at all. Nor is it possible to claim that the instances mentioned belong to the shadowy domain of natural or fundamental rights rather than to the more strictly defined and easily ascertainable category of common law rights. The Fifth Amendment which is one of the clauses of the Constitution invoked in this case, contains a number of prohibitions directed against the action of Congress, all of which are admittedly based upon so-called common law rights rather than upon more general rights or rights not so wholly identified with the development and history of the English law.

If, therefore, for either of the reasons suggested there exist a distinction in the Constitution between the prohibitions in favor of natural rights and those in favor of artificial r ights, consistency necessarily dictates that all the artificial rights may equally be denied by Congress to the inhabitants of new territory to which the Constitution has not been either expressly extended or which has not been incorporated into the United States. Taking, therefore, these rights *seriatim*, our opponent must admit that if the language

1. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury"

is compatible with a trial on information in Hawaii, then it must also be admitted that

2. "any person (in such territory may) be subject for the same offence, to be twice put in jeopardy of life or limb"

or may be.

3. "compelled in any criminal case to be a witness against himself"

or may

4. "be deprived of life, liberty or property WITHOUT DUE PROCESS OF LAW"
and private property may be

5. "Taken for public use without just conpensation."

The Sixth amendment like the Fifth is devoted to consecrating the peculiar forms and procedure long deemed necessary to the maintenance of English liberty, and if jury trial belongs to the category of the artificial or remedial rights these rights likewise belong to the same category, and the court, if they adopt the view of our learned opponents, must hold that the laws of Hawaii, without violation of the Constitution, might have deprived persons in criminal prosecutions from enjoying

(1) "the right to a speedy and public trial;"

(2) "to be informed of the nature and cause of the accusation,

(3) to be confronted with the witnesses against him,

(4) to have compulsory process for obtaining witnesses in his favor,

(5) and to have asistance of counsel for his defense."

Not one of these rights was protected against the action of the Government in the Roman law countries at the time of the adoption of the Constitution, and they are clearly common law rights in their genesis and development. They were totally opposed to the inquisitorial system of the civil law. They are thus exactly in the same category with the right to be tried only upon presentment by a grand jury and to be convicted only upon a unanimous verdict of a petit jury. *No refinement of philosophy can segregate the rights contained in these two amendments into different classes.*

Should the Court, therefore, adopt the view of counsel for the Territory, that Congress has not extended the Constitution to Hawaii by the Joint Resolution, and hence the inhabitants of that Territory could lawfully be tried without indictment, such a decision would be equally authority for the proposition that they were likewise without the protection of the other rights mentioned.

In conclusion upon this point, it is respectfully submitted that (1) neither the suggested distinction between natural and artificial rights, nor (2) the distinction between the prohibitions going to the root of the power and those regulating its exercise are sound or based upon any consistent theory.

If in the lapse of time some of the rights guaranteed by the Constitution may be deemed of less importance than formerly, it may be that the people should be called upon in the regular way to amend that instrument. The framers believed jury trial to be an essential element of liberty. Possibly some of our people no longer take that view. The change in public sentiment, if such there be, cannot be sufficient reason to induce this Court to make a decision which will, for the first time, be authority for the proposition that law courts, acting under United States authority, may in our own domestic territory, without acting "contrary to the Constitution," violate every right which English speaking men have considered vital since the barons humbled King John at Runnymede.

It is quite impossible to hold that Osaki Mankichi might lawfully have been convicted without the intervention of a grand jury and the unanimous verdict of a petit jury without also holding that his property might have been taken for public use without just compensation, or that he might have been compelled in this case to be a witness against himself without having been informed of the nature and cause of the accusation or allowed to have process for obtaining witnesses, or assistance of counsel for his defense, and that having been convicted by these methods, he might have, if the municipal law of the Territory sanctioned it, been condemned to burning at the stake.

Can such doctrine obtain the sanction of this Court? There can be no reversal of this decision unless the Court be prepared to go to that length.

In conclusion, we submit that

(1) By the act of Congress annexing the Hawaiian Islands, its legislation was intended to be made to con-

form to the requirements of the Fifth and Sixth Amendments, as is the case in other Territories of the United States. This is the plain meaning of the language employed.

(2) The situation of Hawaii was such that Congress evidently considered its institutions assimilable to those of the United States, and that to give any other interpretation to the language of Congress would be a plain violation of the spirit as well as of the letter of the Joint Resolution.

(3) To argue that the words "nor contrary to the Constitution" mean nothing, but were employed to show that Congress understood the Constitution to carry some vague kind of humanitarianism based upon a supposed "law of nature" into Hawaii is utterly unsound and wholly fanciful.

**The decision of the Court below should be sustained.**

All of which is respectfully submitted.

New York, February 25th, 1903.

GEORGE H. DAVIS and
F. M. BROOKS,
Attorneys for Appellee.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
CHAS. FRED. ADAMS,
of Counsel.

# APPENDIX.

## Joint resolution to provide for annexing the Hawaiian Islands to the United States (30 Stat. 750.)

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.*

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7, 1898.